SUPREME COURT, U. S.

APR 28 1969

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No. 1320

In the Supreme Court of the United States

OCTOBER TERM, 1968

CUNNINGHAM BROTHERS, INC., a Wisconsin Corporation,
Petitioner,

vs.

HARRY BAIL, WALTER GABEL, WILLIAM KATZ, BEN PETERS, ED UNGRUND, DEAN ADDIS and DAVIDSON MASONRY & RESTORATION, INC., an Illinois Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To The United States Court Of Appeals For The Seventh Circuit

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To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

The opinions of the United States District Court for the Eastern District of Illinois and the United States Court of Appeals for the Seventh Circuit are not reported, officially or unofficially, at the present time. The opinions are set forth in the Appendix attached hereto.

I.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on March 10, 1969 sustaining the opinion of the District Court for the Eastern District of Illinois filed June 19, 1968 dismissing Petitioner's Complaint and denying Petitioner's Motion for Leave to File Amendment to Complaint.

Petition for Rehearing in the Court of Appeals was filed March 18, 1969 and denied on April 3, 1969. No order has been entered varying the requirements of the Rules and Statutes governing time within which to petition this Court for writ of certiorari.

Jurisdiction is conferred on this Court by the provisions of Title 28, Section 1254(1), United States Code.

II.

QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner's Complaint for Declaratory Judgment to determine rights under certain contracts and to avoid multiplicity of suits in the Federal and State Courts with potentially inconsistent results properly dismissed and relief under the Federal Declaratory Judgment Act refused by the Courts below, as a matter of discretion only, on the sole ground that prospective personal injury claimants joined as Defendants in such action would be required to comply with Federal Rule of Civil Procedure 13(a) on compulsory counter-claims?

2. Did the Court of Appeals' refusal to entertain Petitioner's asserted present right to indemnity deny Petitioner its rights under Illinois substantive law?

III.

STATUTORY PROVISIONS INVOLVED

Title 28, sec. 2201, United States Code provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

IV.

STATEMENT OF THE CASE

This is an action for declaratory judgment by the Petitioner Cunningham Brothers, Inc., a Wisconsin Corporation, brought pursuant to the provisions of Section 2201, Title 28 of the United States Code in the United States District Court for the Eastern District of Illinois. Federal jurisdiction in the District Court was based upon Section 1331(a), Title 28, United States Code.

After service of summons, Respondent William Katz answered the Complaint and filed Counterclaim against the Petitioner, Davidson Masonry & Restoration, Inc. and Moore Business Forms, Inc. Respondents Harry Bail, Walter Gabel, Ben Peters, Ed Ungrund, Dean Addis and Davidson Masonry & Restoration, Inc., an Illinois Corporation, by their attorneys, filed a Motion to Dismiss the Complaint and requesting that the District Court decline to grant declaratory relief as requested by Petitioner.

Subsequently, Respondent Harry Bail, by additional attorneys, filed a later Motion to Dismiss the Complaint. Petitioner filed a Motion for Leave to File Amendment to Complaint to show that litigation had been commenced by Respondent Addis against it in the Illinois state courts. On June 19, 1968, however, the District Court entered its separate Orders denying Motion by Petitioner for Leave to File Amendment and allowing the Motions to Dismiss Complaint filed by the various Respondents.

Appeal was taken to the United States Court of Appeals for the Seventh Circuit and on March 10, 1969, that Court rendered its opinion affirming in full the District Court. Petition for Rehearing was filed on March 18, 1969 and denied on APRIL 3, 1969.

This litigation arises out of an occurrence on May 16, 1967 at the premises of Moore Business Forms, Inc. at Charleston, Illinois where a plant was then under construction with work being performed by all of the individual Respondents who were employees of Respondent Davidson Masonry & Restoration, Inc. On October 10, 1967, Respondent Gabel filed his Complaint for personal injuries in the District Court below and, thereafter, on November 9, 1967 the present declaratory judgment action was commenced by Petitioner.

The Complaint was stated in three counts and none of the allegations therein were controverted for purposes of disposition of the Motions by Respondents below or in the Court of Appeals, notwithstanding that Court's assertion that the allegations of the Complaint were not supported by the record. On February 10, 1967 Petitioner contracted as general contractor to build a certain structure for Moore Business Forms, Inc. and on March 27 of that year Respondent Davidson submitted a bid to accomplish certain masonry work on the job. On April 6,

1967, a purchase order number was issued by Petitioner to Respondent Davidson and on the date of the occurrence Davidson was engaged in masonry work at the job site assisted by all of the individual Respondents. At that time, Petitioner had no right of control or supervision of the individual Respondents or of the project either by actively engaging in the control of the individual Respondents' activities or by retaining any such right to control by contract, sole charge of the work, activities and duties being performed by the individual Respondents resting in Respondent Davidson. On May 16, 1967 the individual Respondents placed a platform on certain joists and stood upon same which gave way causing them to fall to the ground where all sustained injuries. The individual Respondents have made claims against the Petitioner under the Illinois Structural Work Act, Chapter 48:60 *et seq.*, Illinois Revised Statutes (1965).

Count I of the Complaint is directed against the individual Respondents only and seeks a declaration that the Petitioner did not "have charge of" the erection, construction, repairing, alterations, removal or painting on the physical plant under construction on the date indicated at the construction site within the meaning of the Illinois Structural Work Act and that, accordingly, said Respondents have no cause of action under the Structural Work Act against Plaintiff for any personal injuries they may have sustained on the date of the occurrence. Count II of the Complaint is directed against Respondent Davidson Masonry & Restoration, Inc. and seeks a declaration that by reason of its contract with the Petitioner, Davidson is liable to indemnify and hold harmless Petitioner for any and all sums which may be recovered against it by the individual Respondents for the aforesaid personal

injuries. Count III of the Complaint is also directed against Respondent Davidson and seeks a declaration that the negligence of the Petitioner, if any, was passive only and that the negligence of Respondent Davidson was active, and, accordingly, Davidson is obliged to indemnify and hold harmless the Petitioner for any sums which the individual Respondents may recover against Petitioner by reason of their injuries allegedly received on the date of the occurrence.

V.

ARGUMENT

It has been recently stated that the basic question in each declaratory judgment case is whether the facts alleged, under all of the circumstances, show that there is substantial controversy between parties having adverse legal interest, of sufficient immediacy and reality to warrant the entry of a declaratory judgment. *Zwickler* v. *Koota,* 389 U.S. 241, 244, 88 S.Ct. 391, 393 (1967). Moreover, it has been held that to invoke Section 2201 there must exist between the parties a justiciable controversy. *American Needle & Novelty Co.* v. *Schuessler Knitting Mills, Inc.,* 379 F.2d 376 (7th Cir., 1967). It seems plain that these criteria are met by the facts alleged in the Complaint. Indeed dismissal by the District Court was based upon the assumption that a cause of action was in fact stated which, for reasons of discretion, would not be entertained. Clearly, the Petitioner has adverse legal interests to all of the Respondents since it is potentially subject to substantial liability under the Illinois Structural Work Act as evidenced by the two lawsuits already filed and the Counterclaim asserted in the present litigation prior to dismissal by Respondent Katz. Immediacy and reality are undeniable.

Individual Respondent Gabel filed a Complaint with the District Court on October 10, 1967 seeking damages against Petitioner which action predated the present one. But the mere existence of another pending action involving the same or similar issues or parties is not, standing alone, sufficient reason for ordering dismissal of a declaratory judgment complaint. *National Union Fire Ins. Co. of Pittsburgh* v. *Lippert Brothers, Inc.,* 233 F.Supp. 650, 654 (D.

Neb., 1964). The factor to consider in determining whether to dismiss a declaratory judgment complaint because of another action involving the same or similar issues and parties are the degree to which the issues can be integrated, the finality of declaratory judgment relief as compared to the action for traditional relief, the convenience of respective forums, if any, the priority of commencement of the suits, and the applicable substantive law. *National Union Fire Ins. Co. of Pittsburgh* v. *Lippert Brothers, Inc.*, 233 F.Supp. 650, 654 (D.Neb., 1964). And when a pending action involves the same set of circumstances as a declaratory judgment complaint, the use of the declaratory judgment statute is justified when the overall exigencies of the situation compel the conclusion that available relief which can be derived from pending litigation is inadequate as compared to that which can flow from the declaratory judgment action. *National Union Fire Ins. Co. of Pittsburgh* v. *Lippert Brothers, Inc.*, 233 F.Supp. 650, 654 (D.Neb., 1964). It is plain that resolution of the lawsuit brought by Respondent Gabel one way or the other will not protect this Petitioner and the courts from the burdens of separate and multiple suits by all of the individual Respondents in the present action. The other Respondents are not bound by what may occur in Respondent Gabel's suit and even if this Petitioner were to defeat Gabel's suit, it would be unavailing to prevent commencement of new suits by the other individual Respondents separately or to assure judgment in favor of the Petitioner in such subsequent suits. Plainly, the existence of the Gabel's sole suit and its priority in point of time alone would not constitute justification for dismissal of this Petitioner's Complaint.

The fact that not all of the Respondents have chosen to sue the present Petitioner at this point is not controlling.

The word "actual" as used in Section 2201 requiring an actual controversy is used for emphasis rather than definition. *Southern Railway Co.* v. *Brotherhood of Locomotive Firemen, etc.,* 223 F.Supp. 296, 304 (M.D.Ga., 1962), aff'd. 324 F.2d 503 (5th Cir., 1963). And the distinction between a case appropriate for judicial determination on the one hand and the dispute of hypothetical or abstract character on the other is necessarily one of degree. *Smith-Corona Marchant, Inc.* v. *American Photocopy Equip. Co.,* 214 F.Supp. 348, 350 (S.D.N.Y., 1962). By definition there must be doubtful questions for declaratory relief to be granted. *Vandiver* v. *Transcontinental Gas Pipe Line Corp.,* 222 F.Supp. 731, 733 (M.D.Ga., 1963). The test of availability of declaratory judgment is whether it will effectively solve the problem, whether it will serve a useful purpose and whether the other remedy is more effective or efficient. *Western* v. *McGehee,* 202 F.Supp. 287, 294 (D.Md., 1962).

It appears that all of the traditional criteria for a cause of action have been met and the District Court did not take serious issue with that in its opinion.

The District Court correctly stated that the granting of declaratory relief is a matter which lies within the sound discretion of the Court to be reasonably exercised and it appears that it was only on that basis that the District Court dismissed the Complaint. In support thereof, it was stated that no case could be found in which the type of relief asked for by Petitioner had been allowed. That position is inconsistent with later portions of the opinion where the District Court attempted to use precedents which do not present factual situations analogous or apposite to the present situation. Nevertheless, it should be plain that the mere lack of precedent should not alone sanction refusal of relief and dismissal particularly at the pleading stage. It

should be remembered that the Declaratory Judgment Act itself is a fairly recent and innovative development in federal law and may even still be viewed by some as radical. Nevertheless it has been recognized that the purpose of the Act is to afford relief from uncertainty and insecurity with respect to legal relations. *Sears, Roebuck & Co.* v. *American Mut. Liability Ins. Co.*, 372 F.2d 435 (7th Cir., 1967). Sections 2201 and 2202 are remedial provisions and should be given a broad, liberal construction. *Japan Gas Lighter Association* v. *Ronson Corp.*, 257 F.Supp. 219, 237, 243 (D.N.J., 1966). As the Court there stated so forcefully:

> "The Declaratory Judgment Act was designed to relieve potential defendants from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure—or never. The Act permits parties so situated to forestall the accrual of potential damages by suing for a declaratory judgment, once the adverse positions have crystallized and the conflict of interests is real and immediate. . . ."

Both the District Court and Court of Appeals state that according to "traditional concepts" of negligence law and litigation the "right" to select the venue and time for bringing litigation belongs to the plaintiff and there has been no "compulsion upon an injured party to settle or litigate upon penalty of being deprived of a substantial right". No authorities are cited for these propositions but even if they were supported by authority, they would not overcome the strong remedial policy of the Declaratory Judgment Act. The fact that traditional remedies may be available is not a valid reason to deny relief under the Act. By definition, that Act is supplemental to existing remedies. *Western Cas. & Surety Co.* v. *Beverforden*, 17 F.Supp. 928 (W.D.Mo., 1936). The District Court cites

Fireman's Fund Ins. Co. v. *Hanley,* 140 F.Supp. 206 (W.D. Mich., 1956) for the proposition that Petitioner seeks to adjudicate issues which can be adjudicated in the action first filed by Respondent Gabel. However, the *Hanley* case involved only one suit and not multiple suits or piecemeal litigation as are presented here. Whatever happens in the suit brought by Respondent Gabel, the results will not be binding with regard to the other individual Respondents and this Petitioner will be subjected to multiple suits. In these times where litigation backlogs are a major problem commanding far-flung attention in all judiciaries, every means compatible with the sound administration of justice must be sought and used to forestall multiple suits and vexatious delays. This should be a prime function of the Declaratory Judgment Act. Avoiding several actions where one suit will properly serve is of itself a compelling reason to reverse the lower courts here.

The District Court stated that if the Complaint were sustained there would be "no logical reason to refuse to decline declaratory relief in every negligence action where diversity exists". This invocation of "imaginary horribles" is not persuasive in questions involving construction of a statute designed to serve policy ends, especially where the statute obviously represents considerable innovation in procedural law and tacitly encourage corresponding imaginativeness and reasonable liberality on the part of courts in construing the statutory provisions. Logic of course is merely a tool to reach the correct result most susceptible of serving the policy end but is not an end in itself, much less an obstruction to reaching the desired end. The District Court seems to say Petitioner was asking it to "usurp, pre-empt or foreclose" traditional rights but it is respectfully submitted that what is involved here is an apparent conflict between the policy of the Act and the asserted

claims of the numerous Respondents to brandish the "Damoclean threat of impending litigation". The District Court describes these "traditional remedies" as "adequately and readily available" but of course that means only for Respondents and not Petitioner. It should not be forgotten that the rights of litigants to pursue their remedies in a particular form are not absolute and particularly not as against the strong policy of the Declaratory Judgment Act.

The District Court stated that there was "no good reason to allow one party to compel another party to have several days in court when one would suffice." At most, what is involved would be two "days in court" for the individual Respondents if they chose to sue other parties besides this Petitioner. If they choose to sue this Petitioner, then, under Rule 12(a), governing compulsory counterclaims, the present single suit would see a resolution of all issues. Of course, the District Court overlooked the fact that the Petitioner was being exposed to potentially many more days in court than were the individual or corporate Respondents.

The District Court further stated that if it were to "allow this action to stand" the necessary result would be to "force" six injured persons to bring counterclaims for damages and cited authorities indicating it is not the function of a declaratory judgment action to recover damages. But the Petitioner here does not seek damages and the argument is quite beside the point. Of course, the mere fact that Rule 13(a) may come into play and a compulsory counterclaim required can hardly destroy the validity of the underlying action in the first place. Likewise, it cannot be persuasively argued that the mere fact that numerous claims are brought by reason of Rule 13(a) in a declaratory judgment suit is any reason for dismissing the underlying declaratory judgment action. Dealing with a motion to

dismiss similar to that of the Defendants here, the Court in *Lumbermens Mut. Cas. Co.* v. *Borden Co.*, 241 F.Supp. 683 (S.D.N.Y., 1965), at page 703, stated:

> "... Any prejudice which will or may develop can be resolved by a timely and appropriate motion either under Rule 20(b) or Rule 42(b) of the Federal Rules of Civil Procedure. ..."

The Court of Appeals cited cases such as *American Automobile Ins. Co.* v. *Freundt*, 103 F.2d 613, 619 (7th Cir., 1939) in support of its conclusion. However, that case did not involve multiple claims or the prospect of piecemeal litigation and these factors were not discussed by the Court of Appeals. The Court of Appeals also suggested that a personal injury plaintiff may not wish to file a lawsuit at all. That point was answered by the Court in the *Japan Gas Lighter* case, *supra*. But sustaining the Complaint here would not force such a person to file a suit since the compulsory counterclaim could be waived.

The Court of Appeals placed considerable emphasis upon the fact that the individual Respondents were prospective *personal injury* plaintiffs. This seems inappropriate since the Act makes no distinction between persons asserting claims for personal injuries from other types of prospective plaintiffs and if there are any policy grounds supporting the distinction apparently made by the Court of Appeals, they are not disclosed in the opinion.

The Court of Appeals indicated Petitioner failed to demonstrate how sustaining the Complaint would afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations but, of course, the uncertainty and insecurity sought to be avoided is that which necessarily follows from exposure to multiple suits by the various individual Respondents with the very real possibility of inconsistent results.

The Court of Appeals thought the real purpose of the Complaint was to determine issues of negligence rather than contractual liabilities but it is plain that the only basis for an adjudication of non-liability on the negligence or any other issue involved in favor of this Petitioner would be on the basis of its contractual arrangements with Davidson Masonry & Restoration, Inc. In spite of what the Court of Appeals stated there is in fact an indemnity clause contained in the contracts between Petitioner and Respondent Davidson. The purchase order issued by Petitioner to Davidson specifically states that the contract between the parties incorporates by reference the provisions of the general contract between the owner and the Petitioner. Article 37 of that general contract, which is binding upon the subcontractor, states that the subcontractor is to assume towards the general contractor all of the obligations and responsibilities that the general contractor assumes toward the owner. Article 36 of the general contract provides that the contractor is as fully responsible to the owner for the acts and omissions of his subcontractors and of persons either directly or indirectly employed by them as he is for the acts and omissions of persons directly employed by him and this principle would certainly apply to the subcontractor. Moreover, in Illinois, it is not necessary that the contract specifically provide for indemnity since the law implies such terms in the type of contract involved here. See *Moroni* v. *Intrusion-Prepakt, Inc.*, 24 Ill.App.2d 534, 540 (1st Dist., 1960). The Complaint alleged a duty based on the contract and that allegation was not contradicted and must be assumed true for purposes of disposing of the motions attacking the Complaint.

Furthermore, the Court of Appeals omits entirely discussion of Count III of the Complaint which asserts an

indemnity claim on the basis of primary, active negligence of Davidson. Declaratory judgment is precluded apparently because the Court thought there was no adverse legal interest "... of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." However, as a matter of substantive Illinois law, the legal interest of Petitioner is in fact recognized and it is adverse. *Robinson* v. *Jarvis,* 26 Ill.App.2d 485 (1st Dist., 1960); *Blaszak* v. *Union Tank Car Co.,* 37 Ill.App.2d 12 (1st Dist., 1962); *Miller* v. *DeWitt,* 59 Ill.App.2d 38 (4th Dist., 1965), aff'd. in part and rev'd. in part 37 Ill.2d 273 (1967).

The Court of Appeals is also in error in stating there is no contractual duty to defend and therefore no duty to do anything until the indemnitee (Petitioner) is adjudged liable. The Purchase Order issued by Petitioner requires Davidson to have insurance for liability purposes and if in fact liability is properly Davidson's and not Petitioner's, Davidson's insurance carrier will have to assume the defense and save Petitioner the burden of counsel fees and expenses. Thus, there is in fact a contractual duty to defend and the Petitioner has a present right to seek a declaration that it need not be forced to incur the burden of defense which, if Davidson is liable, is Davidson's alone.

Plainly, there is a legal relationship between Petitioner and Davidson and adverse legal interests between the two which are of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. Petitioner contends in any event it is entitled to indemnity and should be freed from the burden of defending this suit that the individual Respondents may bring. The Court of Appeals apparently turned its dismissal of Counts II and III of the Complaint on the basis that there was no contractual duty to defend. That is incorrect, as demonstrated above. This is one of the things that distinguishes the

present case from *National Valve & Mfg. Co.* v. *Grimshaw,* 181 F.2d 687 (10th Cir., 1950), cited by the Court of Appeals. Furthermore, in *Grimshaw,* the primary issues between the personal injury plaintiff and the plaintiff in the declaratory judgment action were to be very quickly determined by the state supreme court in an appeal by the declaratory judgment plaintiff from a judgment in favor of the personal injury plaintiff in the state court. Furthermore, only one personal injury plaintiff was involved in the *Grimshaw* case. Finally, Illinois law was not controlling in the *Grimshaw* case.

In spite of any precedent on all fours, the Complaint in this case is one that should be sustained. The purpose of the Act has been stated to be avoidance of trying cases piecemeal and to afford adequate, expedient and inexpensive remedies for declaring rights and obligations of litigants *in one action. Savini* v. *Sheriff of Nassau County,* 209 F.Supp. 946, 950 (E.D.N.Y., 1962). It has been specifically stated that a necessary and desirable function of the Act has been to allow a prospective Defendant to expedite the hearing of his defense to an impending or threatened action by another. *Government Employees Ins. Co.* v. *LeBleu,* 272 F.Supp. 421, 426-427 (E.D.La., 1967). And in *Smith* v. *Trenton Cas. Co.,* 281 F.Supp. 661, 670 (E.D.Tex., 1968) it was quite recently stated that: "One important function of a declaratory judgment is to avoid multiplicity and circuity of actions." This Court has held that Section 2201 allows prospective defendants to sue to establish their non-liability, *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500, 504, 79 S.Ct. 948, 953 (1959), and the principle was recently recognized in *Lumbermens Mut. Cas. Co.* v. *Borden Co.,* 241 F.Supp. 683, 691-692 (S.D.N.Y., 1965) where it was stated that a declaration of non-liability is within the ambit of justiciability.

The late Judge Soper stated that a plaintiff may have an adequate remedy elsewhere or that he seeks to establish a defense to a pending claim rather than affirmative relief, does not preclude a declaratory judgment. *Aetna Cas. & Surety Co.* v. *Yeatts,* 99 F.2d 665 (4th Cir., 1938). Of course here, Petitioner seeks affirmative relief by way of declaration of its rights under contract with Respondent Davidson. In order to have such a declaration binding, the necessary parties including the individual Respondents must be joined and the question of alleged negligence litigated.

But even where the ultimate issues seem to be such as will probably be resolved against a declaratory judgment plaintiff, the federal district courts should and will entertain complaints. To illustrate, in *Schackman* v. *Arnebergh,* 258 F.Supp. 983, 995 (C.D.Cal., 1966) certain motion picture films were clearly, unequivocally, and uncontrovertibly obscene and pornographic so as to preclude the finding of any substantial federal question by way of deprivation of civil or constitutional rights. But nevertheless, the district court was held to have the power and *duty* to decide an action by the plaintiff film exhibitors seeking declaratory judgment that the films were *not* obscene and an injunction against enforcement of the California Obscenity Statute. It was further held that convening a three-judge court was not required.

Furthermore, where a bus company sought a declaratory judgment in respect to claims, complaints and expenditures which it might in the future be compelled to pay as a result of an accident which occurred when a tire furnished by a defendant tire company under a tire supply contract blew out and the bus company was not seeking only immediate indemnification the District Court held the bus

company was entitled to have a remedy and relief under the Declaratory Judgment Act. *Gray Line Co.* v. *Goodyear Tire & Rubber Co.*, 280 F.2d 294, 303 (9th Cir., 1960).

Federal jurisdiction of the Complaint is clearly established. Both the District Court and Court of Appeals failed to fully consider all of the factors present and this Petitioner was entitled to have them considered.

It is respectfully submitted that full consideration of all such relevant factors does in fact require reversal of the courts below. Other remedies are not adequate. Litigation of the suit brought by the Respondent Gabel or that more recently brought by Respondent Addis do not preclude the other Respondents from suing this Petitioner and subjecting the courts and this Petitioner to multiple suits and piecemeal litigation. This is the very sort of mischief the Declaratory Judgment Act is designed to avoid. Petitioner is still potentially subject to four additional suits, if the District Court's judgment is upheld. Altogether that makes six separate lawsuits that the courts must process and this Petitioner defend. Because of the apparent intention of counsel for Respondent Addis to avoid federal jurisdiction, the cases could not even be consolidated. If the Complaint is sustained then all of the individual Respondents would have to bring in the present suit any claims under the Structural Work Act of Illinois to be asserted since the right to seek declaratory judgment is subject to the "same transaction or occurrence" and "same subject matter" test requirements of Rule 13, relating to compulsory counterclaims. *Hensley Equip Co.* v. *Esco Corp.*, 383 F.2d 252, 266 (5th Cir., 1967). Once all counterclaims were filed and the declaratory judgment Complaint at issue, the District Court could determine the soundest course of a judicial administration as far as trying together all Complaints and counterclaims or severing

some for trial purposes, etc. This would be far better than leaving the federal and state judiciaries subject to the arbitrary filing of lawsuits by the individual Respondents. It is submitted that to encourage these individual Respondents to file separate suits in various jurisdictions will work to the very serious detriment and prejudice of this Petitioner contrary to the policy and express language of the Federal Declaratory Judgment Act. It is submitted that the policy of the Act should prevail in the instant suit.

Even assuming the general rule to be that a defendant cannot litigate a defense in a declaratory judgment action, the present case is not covered by such a rule. What is sought is affirmative declaration of relief under the contracts. Furthermore, there are multiple potential suits against the Petitioner and the situation is far different from where one single defendant attempts to get a declaratory judgment that his defense against a single plaintiff is valid. The difference between multiple and single litigants brings into play the policies and commands of the Declaratory Judgment Act. It is respectfully submitted that the Declaratory Judgment Act is available in the present suit and that while there may be no precise precedent on all fours with Petitioner's Complaint, there is likewise none opposing it and this Court should hold the remedial provisions of the Act available to this Petitioner.

It is submitted that this Court should grant this Petition because the Courts below have decided an important question of federal law which has not been but should be settled by this Court and because the decisions below are in error and also because the Court of Appeals has decided an important State question in a way in conflict with applicable State law.

The importance of the Declaratory Judgment Act is evidence by the continuing review given it by this Court. *United States* v. *Mississippi,* 380 U.S. 128, 85 S.Ct. 808 (1965) (action challenging validity and administration of state voting laws); *Railroad Transfer Service* v. *City of Chicago,* 386 U.S. 351, 87 S.Ct. 1095 (1967) (action challenging constitutionality of city ordinance regulating operations of certain intrastate carriers); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 87 S.Ct. 1507 (1967) (action attacking construction by federal Commissioner of Food & Drugs of certain statutes by way of regulations); *Zwickler* v. *Koota,* 389 U.S. 241, 88 S.Ct. 391 (1967) (action to declare state penal statute unconstitutional on its face); and *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 88 S.Ct. 733 (1968) (liberalization of "indispensable party" requirement under Act). This Court should grant the Petition herein and reverse the Courts below and thereby maintain and continue construction of the Act so as to foster its remedial purposes.

As indicated above, there are no precedents on all fours with the present case. Before the decisions below, however, claims for relief such as that advanced by Petitioner here may have been sustained in District Courts but now such relief is forbidden. The reason the wrong decisions below merit review by this Court is because of the effect they will have upon judicial administration and backlogs throughout the federal judiciary. Petitioner's Complaint, if sustained, would result in a considerable saving of judicial time as well as resources and time of the parties. It would also remove the exposure of Petitioner to multiple suits with possibly inconsistent results. Petitioner's approach is far more desirable than that advocated by the Respondents below, viz., multiple suits in different jurisdictions tried separately although the same transaction,

occurrence and issues of fact and law are involved in each separate case. While on the surface it may appear that the decision in the Court of Appeals will narrow federal jurisdiction and prevent an increase in declaratory litigation, analysis demonstrates that the contrary is true. There is no way in the present case to keep out of the federal judiciary any of the suits that may be filed by the individual Respondents against this Petitioner if their claims are in excess of $10,000.00. Six separate suits will surely be a greater burden on the federal judiciary than the one suit which Petitioner's Complaint contemplates. This is an important question of federal law because of the importance of the rights of this Petitioner and other litigants in its position and because of the importance to sound judicial administration of the federal judiciary. The importance of this latter factor need not be detailed to this Court which is of course completely familiar with the latest report from the Director of the Administrative Office of the United States Court for the year ended June 30, 1968 (see summary at 54 A.B.A.J. 1096 (Nov., 1968)). Even the backlog in the Courts of Appeals has been the recent subject of concerned scholarly comment. Carrington, "Crowded dockets and the courts of appeals: the threat to the function of review and the national law," *82 Harv.L.Rev. 542* (Jan., 1969).

Secondly, the Court of Appeals has rendered an opinion in serious conflict with substantive Illinois law regarding right to indemnity indicating that Petitioner here has no such present right. The authorities cited above indicate that the contrary is the case. Again, in the interests of orderly judicial administration, this Court should review that portion of the decision below to preclude confusion not only in litigation pending in the Illinois state courts but to preclude forum shopping by litigants filing

suits in the federal courts to obtain the benefit of the erroneous decision of the Court of Appeals below which would not be enforced in the state courts of Illinois. There is no effective way to correct the conflict between the Illinois state courts and the federal courts applying Illinois law except for review by this Court and it should be granted here to terminate the untoward consequences of the Court of Appeals' decision.

VI.

CONCLUSION

Accordingly, this Court should allow this Petition, enter order pursuant to Rule 25 and, after plenary consideration of the cause, reverse the judgments of the Court of Appeals and District Court and remand with directions that Respondents answer the Petitioner's Complaint herein.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of June 19, 1968 of United States District Court for the Eastern District of Illinois.

On May 16, 1967, Walter Gabel, William Katz, Ben Peters, Ed Ungrund, Dean Addis and Harry Bail, employees of Davidson Masonry & Restoration, Inc., an Illinois Corporation, were preparing to do masonry work on an addition to the Moore Business Forms, Inc., plant at Charleston, Illinois. Masonry walls had been erected and steel bar joists were in place in order to receive the metal deck and roof on the addition being built. The six masons had placed planks on the bar joists and had loaded the planks with mortar and blocks in preparation to block in around the bar joists. While the men were upon the planks placed upon the joists, the platform, mortar, blocks and men fell to the floor of the building. Each of the men sustained personal injury.

On October 10, 1967, Walter Gabel filed his complaint in this court seeking damages for personal injuries sustained in the fall. Thereafter, on November 9, 1967, the plaintiff in the instant action, Cunningham Brothers, Inc., a Wisconsin Corporation, filed a complaint in this court naming Walter Gabel, Harry Bail, William Katz, Ben Peters, Ed Ungrund, Dean Addis and Davidson Masonry & Restoration, Inc., as Defendants. The action was based upon diversity of citizenship. It was alleged that Cunningham Brothers, Inc., was a Wisconsin corporation and all other defendants were Illinois citizens. The plaintiff in this case alleged that on February 10, 1967, it had entered into a contract with Moore Business Forms, Inc., to act as general contractor to build an addition to a plant in Charleston, Illinois, within the Eastern District of Illinois.

The complaint alleged that Davidson Masonry & Restoration, Inc., an Illinois Corporation, submitted a bid for masonry work on the addition to the Moore Business Forms, Inc., building on March 27, 1967, and that thereafter, a purchase order was issued by the plaintiff to Davidson Masonry & Restoration, Inc., on April 6, 1967.

It was alleged that it was that work represented by the bid and purchase order in which the six individual defendants were engaged at the time the platform fell causing the six individual defendants injury.

Plaintiff's complaint is in three counts allegedly brought pursuant to the provisions of §2201 of Title 28, U.S.C. In Count I, plaintiff asks the court to declare that plaintiff did not "have charge of" the erection, construction, repairing, alterations, removal or painting on the physical plant under construction at Moore Business Forms, Inc., within the construction and meaning of the provisions of the Structural Work Act of Chapter 48, Illinois Revised Statutes, and further prayed that the court decree that the six individual defendants have no cause of action under the Structural Work Act against the plaintiff for any damages sustained by them as a result of the injuries received from the fall of May 16, 1967.

Plaintiff requests that the court order and decree that Davidson Masonry & Restoration, Inc., is, by reason of its contract, liable to indemnify and hold the plaintiff harmless for any sums that the individual defendants might recover against the plaintiff for injuries received on May 16, 1967, under Count II of the complaint.

In Count III, Plaintiff requests that the court declare that the negligence of the plaintiff, if any, was passive only and that the negligence of the defendant, Davidson Masonry & Restoration, Inc., was active and that there-

fore, the corporate defendant is obliged to indemnify and hold the plaintiff harmless for any sums which the individual defendants may recover against the plaintiff by reason of the injuries sustained on May 16, 1967.

Defendant, William Katz, answered Count I of plaintiff's complaint and denied that the work performed by Katz was under the supervision and control of Davidson and denied that the plaintiff had no right of control over the project and denied that the plaintiff was not in charge of the work.

Katz then filed his counterclaim against the plaintiff, Cunningham Brothers, Inc., and Moore Business Forms, Inc., seeking damages for personal injuries sustained by reason of claimed violations of the Structural Work Act, that is, Sections 60-69, Chapter 48, Illinois Revised Statutes. Trial by jury was requested.

Defendants, Walter Gabel, Ben Peters, Ed Ungrund, Dean Addis, and Davidson Masonry & Restoration, Inc., filed a Motion to Dismiss and, in the alternative a request to the court to decline declaratory judgment. In that Motion, these defendants pleaded that there was another action pending commenced by Walter Gabel against Cunningham Brothers, Inc., based upon the same state of facts as alleged in the plaintiff's complaint for declaratory judgment and these defendants contended that that action would effectively and completely adjudicate all of the issues raised in the plaintiff's complaint.

These defendants also contended that the issues raised in plaintiff's complaint could be resolved and adequately determined in the usual and adequate remedy available to all parties and contended that the maintenance of an action for declaratory judgment would result in a duplication of litigation. Additionally, it was claimed that the action for

declaratory judgment was merely an attempt on the part of the plaintiff to initiate a defense in the action presently pending by defendant Gabel and was for the purpose to enable the negligence action defendant to obtain a declaration of non-liability.

The defendant, Harry Bail, filed his Motion to Dismiss the complaint for declaratory judgment contending that the action was premature in that he had made no demand upon the plaintiff or any of the co-defendants. Bail also contended that he was not a party to any agreement between plaintiff and defendant, Davidson Masonry & Restoration, Inc., and so would not be bound by the terms of the contract and contended that his rights should be determined upon the basis of the rules of law relating to violations of the Structural Work Act. Thus, Bail contends that a complete and adequate remedy would be available to the plaintiff at any time a cause of action might be asserted by Bail against the plaintiff relative to plaintiff's liability for negligent conduct or violation of the Structural Work Act. Bail also contended that the owners of the work and the architect in charge of the construction were necessary parties and were not before the court and so, contended that the cause should be dismissed.

Plaintiff, Cunningham Brothers, Inc., thereafter served Interrogatories upon all parties and filed a Motion to consolidate the action brought by Gabel with the instant action. Objections to Interrogatories by all of the defendants except the defendant Katz were filed.

Plaintiff contends that this action is a proper one for declaratory judgment. All parties agree that granting of declaratory relief is a matter which lies within the sound discretion of the court to be reasonably exercised in furtherance of the purposes of the statute. *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237 (Utah,

1952); *Crosley Corporation* v. *Westinghouse Electric & Mfg. Co.*, 130 F. 2d 474; *Western Supplies Co.* v. *Freeman*, 109 F. 2d 693. This discretion is a discretion in determining whether to exercise its jurisdiction in a declaratory judgment action proceeding. *States Steamship Co.* v. *Featherstone*, 240 F. Supp. 830 (Ore., 1965).

No party to this litigation has presented to the court a case wherein a court has granted the type of declaratory relief requested in this case. As a matter of fact, no party has shown the court wherein such a request has heretofore been made. This court believes that the dearth of authority can be easily explained. According to traditional concepts of negligence litigation, the right to determine whether or not a party will litigate, settle or abandon a claim, and the right to select the venue and time for bringing such a claim, has heretofore belonged to the plaintiff. There has been no compulsion upon an injured party to settle or litigate upon penalty of being deprived of a substantial right. This court is of the opinion that such would be the effect if this court were to entertain this action. Traditional remedies are available to all parties. Thus, there would appear to be no good reason to abandon well established procedures in favor of a declaratory judgment action when such an action is by its nature intended to be supplemental and not a substitute for other existing remedies. *Western Casualty & Surety Co.* v. *Beverforden*, 17 F. Supp. 928 (Western Dist., Mo. 1936). The action brought by the plaintiff seeks to adjudicate issues which can be adjudicated in the action first filed by defendant Gabel. That being so, there would seem to be no reason why still another action should be brought involving the same issues. *Fireman's Fund Ins. Co.* v. *Hanley*, 140 F. Supp. 206 (Western District, Mich., 1956); *Franklin Life Ins. Co.* v. *Johnson*, 157 F. 2d 653.

The Federal Declaratory Judgment Act furnishes a convenient vehicle to adjudicate issues arising before a wrongful act has been committed or before a cause of action in its usual and ordinary form already exists but the remedy is not appropriate as a substitute for traditionally available remedies where a cause of action has already matured. Especially this is true in the negligence field. It has been observed that the practice of seeking declaratory judgments in areas where it was never intended that the remedy should be available might well cause Congress to repeal the Declaratory Judgment Act. *Indemnity Ins. Co. of North America* v. *Schriefer,* 142 F. 2d 851 (C.C.A. 4th Cir. 1944). If this court should countenance the action taken here and should determine to grant declaratory relief, there would be no logical reason to refuse to decline declaratory relief in every negligence action where diversity exists. This court declines to usurp, pre-empt or foreclose the right of litigants to pursue traditional remedies which are adequately and readily available. Rather, in the exercise of the judicial discretion reserved to this court to grant or decline declaratory relief, this court declines to exercise jurisdiction and unwarrantedly extend supervision over disputes which should not find their way into the federal judiciary. Each litigant will surely have his day in court by virtue of the prior pending action. There is no good reason to allow one party to compel another party to have several days in court when one would suffice. Each party is entitled to any proper defense and tactic in the handling of his litigation. However, needless expensive, repetitive or coercive litigation will be excluded from the armory of judicial combat by this court. The court notes that there is no provision under Illinois law, whereby this plaintiff could force any of the injured defendants to assert a claim or litigate. Yet the plaintiff's right to litigate the issues presented here cannot be questioned when such issues are presented in a

proper court and at a proper time, and each issue could be properly presented in the action pending between Gabel and the plaintiff.

If this court were to allow this action to stand, the necessary result would be to force six injured persons to bring counterclaims for damages in this suit for declaratory judgment. By virtue of the counterclaim already filed by defendant Katz, this court has been requested to assess damages and the court has been requested to join still another party defendant. "The law is well established that the determination and assessment of damages are not the primary purpose of a declaratory judgment action. In 15 Cyclopedia of Federal Procedure, 3d Ed., §90.22, p. 827, it is stated: 'It is not the function of a declaratory judgment action, and it does not lie, to recover damages.' " *Fireman's Fund Ins. Co.* v. *Hanley,* 140 F. Supp. 206, 213.

The issues which are presented in plaintiff's complaint can better be decided in the prior suit presently pending in this court which was commenced by the defendant Gabel. Therefore, this court will decline to grant declaratory relief as prayed and the cause should be dismissed without prejudice to the plaintiff's right to assert any proper defense in any action which may be brought as a result of the incident of May 16, 1967. For these reasons, plaintiff's complaint is dismissed without prejudice to the plaintiff, but at plaintiff's costs.

The counterclaim filed by William Katz is also dismissed without prejudice to the defendant Katz to file his action in such appropriate venue as he shall select at such time as he may choose. Counsel for defendant Gabel will draw an order in accordance with the views expressed herein.

Entered this 19 day of June, 1968.

United States District Court
/s/ Henry S. Wise

Opinion of March 10, 1969 of United States Court of Appeals for the Seventh Circuit.

Before CASTLE, *Chief Judge,* CUMMINGS and KERNER, *Circuit Judges.*

CASTLE, *Chief Judge.* Plaintiff brings this appeal from the district court's dismissal of its three-count complaint filed against the individual and corporate defendants under the Declaratory Judgment Act, 28 U.S.C. §2201.[1] Plaintiff had contracted as general contractor to construct a building for Moore Business Forms, Inc., at Charleston, Illinois. Defendant, Davidson Masonry and Restoration, Inc., was engaged by plaintiff as the masonry subcontractor for the job, and the individual defendants were employees of Davidson who were injured when the platform on which they were standing collapsed.

Defendant Gabel filed a complaint for personal injuries against plaintiff in the district court on October 1, 1967, plaintiff filed its declaratory judgment complaint on November 9, 1967, defendant Katz counterclaimed in the declaratory judgment suit, and at least one of the other individual defendants has since filed suit against plaintiff in a state court. The individual defendants have based their actions on the Illinois Structural Work Act, Ill. Rev. Stat., 1965, Ch. 48 §60 et seq.

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[1] §2201 Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Count I of plaintiff's complaint is directed against the individual defendants only and seeks a declaration that plaintiff did not "have charge of" the work being performed by these defendants at the job site, within the meaning of the Illinois Structural Work Act, and that those defendants have no "cause of action" against plaintiff under the Act for any personal injuries they may have sustained on the date of the accident. Counts II & III of the complaint are directed only against Davidson Masonry & Restoration, Inc. Count II seeks a declaration that Davidson, by reason of its contract with plaintiff, is liable to indemnify and hold plaintiff harmless for any amount which may be recovered against plaintiff by the individual defendants. The district court dismissed the complaint and held that the action was inappropriate for declaratory relief.

Plaintiff contends that the district court erred in dismissing the complaint since an action by a potential tort defendant against the potential plaintiffs should fall within the purpose of the Declaratory Judgment Act. Thus, instead of having to wait and be sued in different state and federal forums by the various injured parties, plaintiff argues that it should be allowed to bring them together in one action, along with the alleged indemnitor, and thereby adjudicate the rights of all the parties at one time and place.

We hold that the district court was correct in dismissing the complaint, and accordingly affirm the judgment below.

Regarding the individual defendants, we are of the opinion that to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tortfeasor would be a perversion of the Declaratory Judgment Act. The primary purpose

of that Act is "to avoid the accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damages had accrued." *Edelman & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852, 854 (7th Cir. 1937). See also *Milwaukee Gas Specialty Co.* v. *Mercoid Corp.*, 104 F. 2d 589, 591-592 (7th Cir. 1939); *Luckenbach S. S. Co.* v. *United States*, 312 F. 2d 545 (2d Cir. 1963); 6A Moore's Fed. Practice ¶57.06, p. 3021-22 (1966).

Since it is not contended that the present action was brought to avoid damages which would accrue if a certain course of conduct were taken in the future, plaintiff must establish that this suit falls within some other purpose of the Declaratory Judgment Act. Plaintiff attempts to support its action by arguing that the purpose of the Act is not confined solely to settling controversies before they ripen into legal liabilities, but is broad enough to permit the determination of rights which have arisen due to an alleged negligent act which has already occurred. Plaintiff also contends that this action was not brought to determine the issue of negligence, but only to determine the rights of the parties under the contracts between them so as to avoid multiplicity of action.

However, plaintiff has failed to demonstrate how the allowance of the instant declaratory judgment action would "effectuate the purpose of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Sears, Roebuck & Co.* v. *American-Mutual Liability Co.*, 372 F. 2d 435, 438 (7th Cir. 1967); *American Auto Insurance Co.* v. *Freundt*, 103 F. 2d 613, 619 (7th Cir. 1939); *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F. 2d 321, 324 (4th Cir. 1937). Rather, regarding the individual defendants,

plaintiff seems to be attempting to "try issues or determine the validity of defenses in pending cases," as was condemned by *Freundt* and *Quarles, supra.*

Moreover, couching the suit in terms of contract rather than tort does not change the nature of the action. The issue of plaintiff's negligence would necessarily be tried, since the individual defendants would be compelled to counterclaim under Rule 13(a), Fed. Rules Civil Proc. Rules 20(b) and 40(b), regarding separate trials, would be of little value to these defendants, since plaintiff's liability, if any, would be determined in the primary action.

Thus, there is good reason for the noted lack of precedent supporting plaintiff's position. To allow a declaratory judgment action under the facts before us would be to allow a substitute for the traditional procedures for adjudicating negligence cases. We agree with the conclusion reached in *Sun Oil Co.* v. *Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280, 282 (E.D. Pa. 1952), aff'd. (adopting opinion of district court), 203 F. 2d 957 (3d Cir. 1953), that "it is not one of the purposes of the declaratory judgment acts to enable a prospective negligence action defendant to obtain a declaration of nonliability."[2]

To so reverse the roles of the parties would affect more than merely the form of action, but would jeopardize those procedures which the law has traditionally provided to injured parties by which to seek judicial relief. Although "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate," Rule 57, Fed. Rules Civil Proc., we hold that such relief is inappropriate in the instant case

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[2] Of course, non-liability may be declared in appropriate cases *State Farm Mutual Auto Ins. Co.* v. *Mosey*, 195 F. 2d 56 (7th Cir. 1952), cert. den. 344 U.S. 869.

since "more effective relief can and should be obtained by another procedure." *Chicago Metallic Mfg. Co.* v. *E. Katzinger Co.*, 123 F. 2d 518, 520 (7th Cir. 1941).

Although our holding may require the plaintiff here to litigate a number of lawsuits with the injured parties, we feel that this result does not outweigh the right of a personal injury plaintiff to choose the forum and the time, if at all, to assert his claim. We agree with plaintiff that a declaratory judgment action should not be dismissed solely because a more traditional remedy is available. Otherwise, many justiciable declaratory judgment actions would be dismissed on that ground. However, when the traditional remedy provides the parties with the procedural safeguards required by the law to insure the availability of a proper remedy, the courts, in exercising their discretion,[3] may properly dismiss the declaratory judgment action. Since the sustaining of plaintiff's suit in the instant case would force an injured party to litigate a claim which he may not have wanted to litigate at a time which might be inconvenient to him or which might precede his determination of the full extent of his damages, and in a forum chosen by the alleged tortfeasor, we hold that the action was inappropriate for declaratory relief and was therefore properly dismissed against the individual defendants.

There remains the issue of whether plaintiff may seek declaratory relief against the corporate defendant (Davidson), the alleged indemnitor. Initially, two observations

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[3] It is well-established that declaratory relief is discretionary, *Brillhart* v. *Excess Inc. Co.*, 316 U.S. 491, 494 (1942), although a reviewing court may substitute its own judgment for that of the trial court if the latter court's exercise of its discretion is "erroneous." *Sears Roebuck & Co.* v. *American Mut. Liab Ins. Co.*, 372 F. 2d 435, 438 (7th Cir. 1967).

should be made. First, there is no indemnity clause contained in the contract, and plaintiff's claim against Davidson seems to be really based on a common law indemnity theory. Second, during oral argument, counsel for plaintiff stated that if we held that the individual defendants should be dismissed, then the plaintiff would probably rather file a third-party complaint against Davidson in the Gabel action, to determine the issue of indemnity. Irrespective of this concession, we are of the opinion that plaintiff could not maintain a declaratory judgment action against Davidson alone.

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Co.*, 312 U.S. 270, 273 (1941); See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-242 (1937).

It has been held that when an insured is being sued for damages and calls upon his insurer to indemnify and defend the suit, the insurer is "entitled to be advised by a declaratory decree whether it is obligated to defend and indemnify the insured against the claim upon which the suit is brought." *C.Y. Thomason Co.* v. *Lumbermen's Mutual Casualty Co.*, 183 F. 2d 729, 733 (4th Cir. 1950); *Sears, Roebuck & Co.* v. *American Mut. Liab. Ins. Co.*, 372 F. 2d 435, 440 (7th Cir. 1967).

However, in the normal indemnity situation, where, as here, no contractual duty to defend exists, no duty to do anything arises until the alleged indemnitee is adjudged liable. Thus, in the instant case, there is no immediate controversy between the parties since it is not certain

that plaintiff will ever be compelled to pay any judgment for which Davidson could be held liable as indemnitor. See *National Valve Mfg. Co.* v. *Grimshaw*, 181 F. 2d 687, 689 (10th Cir. 1950). In these circumstances we hold that the interests of justice would not be served by entertaining a declaratory judgment action at this time.

For the foregoing reasons, the judgment below is affirmed.

AFFIRMED.